Supreme Court, U.S.
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No. 98-1240 FEB 3 - 1999

OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term 1998

JOHN DAVID LOVELACE,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petition for Writ of Certiorari

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QUESTION PRESENTED

The following question is presented by the Petition for Writ of Certiorari:

1. Whether the trial court, the Court of Appeals of Virginia, and the Virginia Supreme Court err in holding that VA. CODE ANN. §19.2-74 (Michie 1995) does not delimit an officer's authority to search a person, who could have been detained for a violation of law in which a summons should be issued and the detainee released, such that evidence discovered and admitted into evidence as a result of such search does not violate the Fourth Amendment ?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

John David Lovelace, petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Virginia, reproduced in the Appendix, herein, at pages 1-7 , and affirmed by a refusal to grant certiorari in the Supreme Court of Virginia, reproduced in the Appendix at Page 11 , herein.

OPINIONS BELOW

After a suppression hearing, on January 17, 1997, the trial court ruled that evidence obtained from a search of Lovelace's person was admissible. (Appendix, herein, at Page 12).

Lovelace appealed to the Virginia Court of Appeals which affirmed the trial court in a published opinion, June 16, 1998, Lovelace v. Commonwealth of Virginia, 27 Va. App. 575, 500 S. E. 2d 267 (1998), holding that the search of Lovelace did not violate the Fourth Amendment and that Virginia Code §19.2-74 "does not delimit the officers' constitutional authority to search". (Appendix, herein, at Page 13).

Lovelace appealed this ruling to the Supreme Court of Virginia, but the Supreme Court of Virginia refused his petition for appeal. (Appendix, herein, at Page 11).

Lovelace filed a Petition to Rehear in the Supreme Court of Virginia on the grounds that the Court of Appeals of Virginia had issued contrary decisions regarding whether searches incident to noncustodial detentions are unreasonable under the Fourth Amendment, and that the United States Supreme Court had granted a writ of certiorari in Knowles v. Iowa, 569 N.W. 2d 601 (Iowa 1997, certiorari granted March 23, 1998) which involved the question of whether a police

officer may give a driver a routine traffic ticket and also search the car incident to the issuance of a summons.

The action of the Supreme Court of Virginia denying review of the proceedings below occurred on October 5, 1998, and was reflected in a written notice of the same date.

Rehearing was requested and denied November 6, 1998 and was reflected in a written notice of the same date. (Appendix, herein, at Page 10).

The published opinion of the Court of Appeals and the orders of the Supreme Court of Virginia are reproduced in the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C.§1254(1) and the Supreme Court Rule 10(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION AMENDMENT IV.

The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

VA. CODE ANN. § 4.1-308 (Michie 1993)

§4.1-308. Drinking alcoholic beverages, or offering to another, in public place; penalty; exceptions.

A. If any person takes a drink of alcoholic beverages or offers a drink thereof to another, whether accepted or not, at or in any public place, he shall be guilty of a Class 4 misdemeanor....

VA. CODE ANN. §18.2-11 (Michie 1996)

§18.2-11. Punishment for conviction of misdemeanor.—The authorized punishments for conviction of a misdemeanor are: (d) For Class 4 misdemeanors, a fine of not more than $250.

VA. CODE ANN. §19.2-74 (Michie 1995)

(Set out in the Appendix, herein at Page 13)

STATEMENT OF THE CASE

Lovelace was detained on August 24, 1996. As part of his detention, he was subjected to a full custodial search of his person. No summons was issued for any offense relating to the detention. As a result of a search, Lovelace was arrested for possession of marijuana and for possession with intent to distribute cocaine. He was subsequently indicted by a grand jury for possession with intent to distribute cocaine.

Just prior to the trial of these charges, the trial court entertained Lovelace's motion to suppress the evidence seized from him during an unlawful, warrantless search conducted without probable cause. The trial court ruled that the search was lawful and overruled the motion on the grounds that there was probable cause for a summons to be issued against Lovelace for drinking in public, a Class 4 misdemeanor, governed by VA. CODE ANN. §19.2-74(A)(2) (Michie 1995). No such charge, however, had ever been placed against Lovelace.

Lovelace's' exceptions to the admission of the evidence were noted by the trial court.

Lovelace appealed to the Virginia Court of Appeals which affirmed the trial court, holding that the search of Lovelace did not violate the Fourth Amendment, reasoning that probable cause existed to arrest Lovelace for drinking from an open container of alcohol - a Class 4 misdemeanor. Therefore, the Court held, "the existence of probable cause to arrest gave [officers] constitutional authority to conduct a full search of [Lovelace's] person incident to that arrest," despite the fact that Lovelace was never arrested nor issued a summons for the misdemeanor.

The Court of Appeals of Virginia further held that VA. CODE ANN. §19.2-74 (Michie 1995) "does not delimit the officers' constitutional authority to search" even though a full custodial arrest had not been effected.

Lovelace appealed this ruling to the Supreme Court of Virginia, which refused his petition. Lovelace then filed a Petition to Rehear in the Supreme Court of Virginia on two grounds:

1) That the Court of Appeals of Virginia had issued contrary decisions regarding whether searches incident to noncustodial detentions are unreasonable under the Fourth Amendment, and

2) That the United States Supreme Court had granted a writ of certiorari in Knowles v. Iowa, 569 N.W.2d 601 (Iowa 1997, certiorari granted March 23, 1998) which involved the question of whether a police officer may give a driver a routine traffic ticket and also search the car incident to the issuance of a summons.

The Supreme Court of Virginia denied rehearing.

REASONS FOR GRANTING CERTIORARI

Petitioner does not agree that probable cause existed, evidenced by the fact that the officer who detained him never contemplated issuing a citation for the offense for which Lovelace was detained, and no citation ever issued for that offense. It is improper for a court of appeals to examine the facts from a distance and conclude, independently, from the events which occurred that a subsequent search was justified upon probable cause for an offense which was not pursued by the officer. However, the appellant's position concerning the search does not rest solely on the issue of probable cause but is more firmly based on the question of the constitutionality of noncustodial searches.

The Court of Appeals of Virginia has issued contrary decisions regarding whether searches incident to non-custodial detentions are unreasonable under the Fourth Amendment; e.g. whether detentions for minor infractions, governed by VA. CODE ANN. §19.2-74(A)(2) (Michie 195), (reproduced herein at Appendix Page 13) permit officers to effect full custodial arrests and searches of the detainee, absent probable cause. The Court of Appeals in this case, Lovelace v. Commonwealth, 27 Va. App. 575, 500 S. E. 2d 267 (1998), held that §19.2-74 "does not delimit the officers' constitutional authority to search".

Subsequently, the Court of Appeals, relying on Lovelace as precedent under the rules of *stare decisis,* made a similar ruling in Rhodes v. Commonwealth, 28 Va. App. 296, 504 S. E. 2d 390 (1998), and thereafter granted Rhodes' petition to rehear on September 18, 1998, Rhodes v. Commonwealth, 28 Va. App. 450, ___ S. E. 2d ___ (1998) . No date for argument has been scheduled in this matter.

Judge Benton dissented from the decision in Rhodes, recommending that the Lovelace decision should be abandoned. Benton opined that "the principle of *stare decisis* does not require us to 'perpetuate . . . an incorrect

application of the law.'"

Benton further argued that the decisions in Lovelace and Rhodes are contrary to the Court's decision in Stanley v. Commonwealth, 16 Va. App 873, 433 S. E.2d 512 (1993), which held that police officers are "governed by the protocol of §19.2-74 (A)(2) and, specific to the facts of Stanley, that a patdown search incident to a routine traffic stop could not be upheld based solely on a bulge observed in the detainee's clothing, absent a reasonable suspicion that the detainee was armed and dangerous, in which case only a limited pat-down for weapons could be effected under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968).

In addition to the conflict of rulings in the Virginia Court of Appeals, the United States Supreme Court granted a *writ of certiorari* in Knowles v. Iowa, 569 N.W. 2d 601 (Iowa 1997, certiorari granted March 23, 1998) which involves the question of whether a police officer may give a driver a routine traffic ticket and also search the car incident to the issuance of the summons. This Court decided Knowles on December 8, 1998, holding that the search violated the Fourth Amendment, even though it was authorized by state law.

By holding that probable cause to issue a summons for a misdemeanor violation provides police with full authority to conduct a complete search of an individual without effecting an arrest or charging an individual, the Court of Appeals of Virginia lowered the threshold for the requisites of a search under the Fourth Amendment. Its ruling authorizes a search of an individual for evidence of a crime so long as police merely claim later that they have probable cause to arrest for a misdemeanor, unrelated in any way to the purpose of their search. Such a ruling circumvents the protections and intent of the Fourth Amendment.

This Court should grant certiorari in light of the fact that the Court of Appeals of Virginia has not consistently

ruled on this issue; the Supreme of Virginia has never ruled on this issue, and the United States Supreme Court decision in Knowles on a similar question involving the effect of the Fourth Amendment on state law which purports to allow a full custodial search of an individual in situations where officer safety is not an issue and the offense for which the subject is detained is one in which the usual practice is to issue a citation in lieu of arrest.

ARGUMENT

THE TRIAL COURT, THE COURT OF APPEALS OF VIRGINIA, AND THE VIRGINIA SUPREME COURT ERRED IN HOLDING THAT VA. CODE ANN. §19.2-74 (Michie 1995) DOES NOT DELIMIT AN OFFICER'S AUTHORITY TO SEARCH A PERSON DETAINED FOR A VIOLATION OF LAW IN WHICH A SUMMONS SHOULD BE ISSUED AND THE DETAINEE RELEASED, SUCH THAT EVIDENCE DISCOVERED AND ADMITTED INTO EVIDENCE AS A RESULT OF SUCH SEARCH DOES NOT VIOLATE THE FOURTH AMENDMENT.

The question presented to this Court in Knowles v. Iowa was whether the search of Knowles' vehicle, upon the issuance of a traffic citation, purportedly authorized by state law, nonetheless violated the Fourth Amendment. This Court rejected the State of Iowa's argument, under the facts of the case, that Iowa law provided for a "'search incident to citation' exception to the Fourth Amendment's warrant requirement." In rejecting this argument, this Court held that unless there was some concern for officer safety and/or some concern for destruction or loss of evidence "necessary to prosecute" the offense for which the citation was issued, that the "search incident to citation" exception violates the Fourth

Amendment in those cases where custodial arrest has not occurred.

The reasons for rejecting the admissibility of evidence seized from Lovelace as a result of the search incident to his arrest are more compelling than those in Knowles.

The reason for Lovelace's detention is not as definitive as it was in Knowles. Knowles was stopped for speeding, and a citation was issued. Lovelace was never issued a citation, and the officer did not consider arresting him for a misdemeanor prior to his detention. The officers claimed that due to the number of people in the parking lot, they decided to place everyone on the ground. Lovelace was placed on the ground of a parking lot and subjected to a search.

Lovelace was detained on suspicion of drinking from an open container of alcohol in a public place, an offense which, under §19.2-74, allows for the issuance of a citation and release. Lovelace was not, in fact, issued any citation for this offense nor arrested for this offense prior to the search of his person.

The testimony of the arresting officer Mike Womack is clear on this point (R.T. of January 17, 1997)[1]:

Q. You had him on the ground?

A. Yes, sir.

Q. And he's in custody at that point?

A. No, sir; he's being detained. I didn't have him in full custodial arrest or anything

Q. What was he being detained for?

---

[1] Herein, "R.T." refers to a reporter's transcript

A. Like I said, it was open containers of beer. . . (R.T. of Jan. 17, 1997, at 15-16)[2]

Q. All right; what did you do, then, leading up to his arrest?

A. Well, I asked him did he have guns or drugs him, and he didn't reply. So I did a pat down. And when I was doing a pat down I felt something in his pocket, and it felt like a bag, and which I, during my experience I'd found drugs before on people, and sometimes they carried it in these kind of bags. And I had my hands on him. I didn't know if it was a plastic bag or what at that time, but I felt some lumps and I felt ~~it~~ to be sqooshy.

Q. It didn't feel like a gun?

A. Not as I know of; no, sir. . . .

Q. But you physically had to reach into his pocket and grab that?

A. Well, I patted him first and I felt it. I could tell it was a plastic bag of some kind, or something I was familiar with, so I went into his pocket after that, after I felt it.

Q. You didn't know what was in the bag?

---

[2] This transcript, which was of the suppression proceedings in the trial court, was designated as part of the record used on the appeal in the present case. It therefore is properly before this Court.

A. No, sir; I didn't have no idea. . . .

Q. You didn't have any information as to what this item was?

A. No, sir.

Q. And you didn't have a search warrant at that time?

A. No, sir, I didn't.

Q. Nor was he under arrest?

A. No, sir, he was being detained at that time.

Q. Okay, he didn't make any threatening moves toward you, did he, while he was laying on the ground?

A. No, sir. (R.T. of Jan 17, 1997, at 19-20)

Unlike Knowles, Lovelace was never issued a citation for the offense for which he was being detained. By Womack's own testimony, Lovelace was merely being detained and was not under arrest. Under the Fourth Amendment, as interpreted by Terry v. Ohio, 392 U.S. 1, 9, 88 S. Ct. 1868, 1873, 20 L.Ed.2d 889 (1968), Womack, without making a formal arrest or without expressing any intent to do so at the time he detained Lovelace, had authority to conduct a patdown search for weapons only. It was unreasonable for him to conclude that Lovelace was armed and dangerous or that a sqooshy bag in Lovelace's pocket might be a weapon.

In fact, the Commonwealth of Virginia never sought to justify Womack's search of Lovelace on the grounds that Womack had any suspicion that Lovelace was armed or

dangerous or that he was in possession of a controlled substance.

In affirming Lovelace's convictions, the Court of Appeals held that it did not matter that Womack had not arrested Lovelace prior to searching him because Womack had probable cause to arrest him for drinking from an open container of alcohol in violation of §4.1-308, Code of Virginia, 1950, as amended. The Court of Appeals of Virginia stated:

> "The officers' failure to cite appellant for that offense and the Commonwealth's failure to provide evidence to support a conviction for that offense are not dispositive factors because probable cause deals with probabilities rather than certainties.
>
> In addition, the officers' subjective motivations in search appellant are not relevant in this case. 'Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.' Whren v. United States, 517 U.S. 806, 813 (1996)." (Appendix, herein, at Page 5).

Womack's own testimony, however, revealed that at the time he placed Lovelace on the ground and searched him, he had **not** placed Lovelace under arrest for drinking in public in violation of VA. CODE ANN. §4.1-308 (Michie 1993), or for any other violation of law. Nor did Womack ever indicate that he had any intention of doing so. Lovelace was clearly not under arrest at the time of the search and was never arrested for drinking in public.

Had Womack determined that he had probable cause to arrest Lovelace for a violation of the drinking in public statute, such violation would have been a Class 4

misdemeanor, which carries no possibility of incarceration and a maximum fine of $250, VA. CODE ANN. §18.2-11 (Michie 1996). (Referenced, herein, at Page 3). An arrest for a Class 4 misdemeanor is governed by VA. CODE ANN. §19.2-74(A)(2) (Michie 1995) (Appendix, herein at Page 13).

VA. CODE ANN. §19.2-74(A)(2) (Michie 1995) mandates the issuance of a summons and release unless the detainee fails to cooperate or the officer has reason to believe that the detainee will not report to court on the date specified. (Appendix, herein, at Page 14). No evidence of non-cooperation or flight existed in this case.

The Attorney General of Virginia issued an opinion in 1991 regarding this statute, stating that an arresting officer must proceed under §19.2-74 when he arrests a person without a warrant for any offenses committed in the officer's presence **if the offense is one that is specified in this section**, i.e. Class 4 misdemeanor. Because the words in the statute are to be given their usual commonly understood meaning, the use of the word "shall" connotes a mandatory act. (1991 Va. Ag. 127).

The Court of Appeals of Virginia held that §19.2-74(A)(2) "contains no language nullifying the officer's ability to search based on the existence of probable cause" and that neither this code section nor the Constitution requires "a full custodial arrest to permit a complete search of the arrestee."

The Fourth Amendment, however, does prohibit unreasonable searches and seizures. Whether a search is unreasonable is determined by balancing the individual's right to be free from arbitrary intrusions by the government against its countervailing interest in preventing or detecting crime. It is an erosion of the Fourth Amendment to hold that an officer may arrest a man for a trivial offense, such as a Class 4 misdemeanor, and as incident to such arrest search his person.

Conceding, for the purposes of argument, that the officers were warranted in their investigation, their encounter with Lovelace was not consensual and exceeded the scope for which they claim Lovelace was detained. Lovelace complied without resistance by lying face-down on the ground, and he identified himself to the officers. There can be no question that due to the number of officers on the scene and the fact that Lovelace was placed face-down on the ground that a seizure of his person had been effected within the meaning of the Fourth Amendment.

Furthermore, such police action, under the circumstances, was extreme and its outcome unrelated to suspicions regarding alcohol consumption. Had the officers issued a citation for a violation of §4.1-308, they had no reason to do more than issue a summons and release Lovelace according to the provisions of §19.2-74.

Though it is well-settled that once a police officer has properly detained a person for questioning that he may conduct a limited pat-down search for weapons **if he reasonably believes that the suspect might be armed and dangerous**, the authority to do so does not automatically accompany investigative detentions. A pat-down search is appropriate only when the officer can "point to particular facts from which he reasonable inferred that the individual was armed and dangerous". Sibron v. New York, 392 U.S. 40, 63, 88 S. Ct. 1889, 1903 (1968).

Nowhere in the testimony of the officers during the suppression proceedings is there any indication that they reasonably feared for their safety. No officer testified to having seen anything on Lovelace's person indicating that he was armed. No officer expressed any reasonable or particularized suspicion that Lovelace was involved in drug activity. The search of Lovelace did not take place incident to a lawful arrest, and the contraband Womack seized, therefore, was not lawfully seized. Failing to find anything on Lovelace's person that Womack believed to be a weapon,

he exceeded the permissible scope of a pat-down search by unlawfully removing the contents of Lovelace's pocket. Terry v. Ohio, *supra.*

Though police may conduct a full search incident to a lawful custodial arrest, as Judge Benton in his dissenting opinion in Rhodes v. Commonwealth, *supra,* pointed out

> "A custodial arrest for a minor offense and search incident to that arrest are constitutionally unreasonable where by statute a state has 'abjured the authority to execute custodial arrests for [such minor] offenses. United States v. Mota, 982 F. 2d 1384, 1388-89 (9th Cir. 1993). See also People v. Bland, 884 P.2d 312, 318 (Colo.1994) (holding that where statute requires officer to issue notice or summons for violation of minor offenses, custodial arrest and search incident to such arrest are prohibited); Barnett v. United States, 525 A.2d 197, 199 (D.C. 1987) (holding that full custodial arrest for violation of pedestrian traffic regulation violates statute requiring issuance of notice of infraction and that search incident to arrest invalid); Thomas v. State, 614 So.2d 468, 471 (Fla. 1993) (holding full custodial arrest and search incident thereto unreasonable when person is charged with violation of minor ordinance under a statute that provides for only limited detention for purpose of issuing ticket, summons, or notice; State v. Martin, 253 N.W. 2d 404, 405-06 (Minn. 1977) (holding that custodial arrest for petty misdemeanor offense was illegal where state rules provide that officer must issue citation for misdemeanor not punishable by incarceration

and that search incident to arrest invalid.)

It is uncontroverted that Lovelace was not issued a summons in accordance with §19.2-74, nor had Lovelace been arrested prior to the search of his person. During their investigative detention of Lovelace, the pat-down failed to reveal that Lovelace was armed. Lovelace was, in fact, seized and the pat-down exceeded a search for weapons or contraband related to the offense under investigation. The facts of this case do not support the admission of evidence seized in violation of the Fourth Amendment.

CONCLUSION

For the reasons state, John David Lovelace respectfully submits that his petition for a writ be granted. This Court's recent ruling in Knowles v. Iowa that, as in the case at bar, where concern for officer safety is absent and where the need to discover and preserve evidence of the offense for which the individual is being detained is not implicated, the judgment of the Court of Appeals of Virginia allowing the admission of such unlawfully obtained evidence should be reversed, and the cause remanded for further proceedings without the admission of the unlawfully obtained evidence.

Respectfully submitted,

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COURT OF APPEALS OF VIRGINIA

Present: Judges Baker, Annunziata and Senior Judge Cole

Argued by teleconference

OPINION BY JUDGE JOSEPH E. BAKER, June 16, 1998

JOHN DAVID LOVELACE

v. Record No. 1075-97-2

COMMONWEALTH OF VIRGINIA

From the Circuit Court of Halifax County
William L. Wellons, Judge

Joseph A. Sanzone (Joseph A. Sanzone Associates, P.C., on brief), for appellant.

Eugene Murphy, Assistant Attorney General (Mark L. Earley, Attorney General, on brief), for appellee.

John David Lovelace (appellant) appeals his bench trial convictions by the Circuit Court of Halifax County (trial court) for possession of marijuana and possession of cocaine with intent to distribute. He contends the trial court erred in (1) denying his motion to suppress and (2) finding the evidence sufficient to prove he intended to distribute the cocaine. For the reasons that follow, we affirm the convictions.

At about 10:00 p.m. on August 23, 1996, Halifax County Deputies Sweeny and Womack saw appellant standing near a convenience store in an area "known as a[n] open air drug market." He was drinking from a green glass bottle. Deputy Sweeny believed the bottle contained beer, and he told appellant to drop the bottle and lie face down on the ground. "{S]everal other officers converg[ed] on the lot at the same time." "[D]ue to the number of people on the lot," Officer Womack thought it was in the officers' best interest "to put these subjects down on the ground so we could handle the situation if somebody wanted to act up." Womack testified that appellant was being detained because of the open container of beer.

When Womack told appellant to drop the bottle and lie face down on the ground, appellant dropped and broke the bottle. Near appellant's feet, Deputy Womack observed several open bottles of beer and five unopen bottles of beer in a carton. Womack had already seen a bottle hit a car beside appellant as Womack was approaching. Womack smelled the odor of alcohol as he was talking to appellant, although he could not say whether the odor was coming from appellant or from the bottle that had been broken nearby. The bottle which hit the car came from the area where appellant was standing, but Womack did not see whether appellant threw it.

Once appellant was on the ground, Womack asked him whether he had any drugs or guns. Appellant did not reply. Womack then patted appellant down and detected "something in his pocket . . .[that] felt like a bag." "[D}uring [Womack's] experience [he'd] found drugs before on people, and sometimes they carried it in these kind[s] of bags. . . .[He] didn't know if it was a plastic bag or what at that time, but [he] felt some lumps and . . . felt it to be squooshy." Womack could not tell what was in the bag; however, he retrieved the bag, which was later determined to contain 2.38 grams of crack cocaine rocks and 2.96 grams of marijuana. He placed appellant under arrest for possession

of marijuana and cocaine. In appellant's possession, Womack found a black pouch containing $121 and a razor blade. In appellant's pocket, he found $171.30, made up mostly of ten- and twenty-dollar bills.

Womack, who had been a narcotics investigator for about a year and had participated in the investigation and prosecution of thirty-five to forty cocaine cases, was accepted by the court as an expert. He testified that the bag of cocaine found on appellant was "cut up [for sale in dollar amounts of] twenties . . . [and] forties." Womack believed that the quantity of cocaine was inconsistent with personal use and consistent with distribution. Although the form of cocaine found on appellant would usually be smoked, Womack found no smoking devices on appellant or in his car. Womack further testified that possession of the money in ten-and twenty-dollar bills also was 'consistent with distribution of crack cocaine."

Appellant moved to suppress the evidence, claiming he was illegally searched and seized without probable cause to arrest because the content of the open containers was not confirmed and, in fact, he had not been arrested. Even if the officers had probable cause to arrest for the alcohol offense, he contended the offense required that he be released on a summons without a custodial arrest and that Officer Womack was not entitled to conduct a search incident to arrest under those circumstances. Moreover, appellant argued that although the patdown may have been appropriate, the complete search was not permitted because Womack could not identify the plastic bag or its contents by reel and Womack did not believe the item was a gun. The trial court denied the motion to suppress, holding that the evidence was sufficient to give the officers probable cause to conduct the search.

Motion to Suppress

In reviewing a trial court's denial of a motion to suppress, "the burden is upon [appellant] to show that this ruling, when the evidence is considered most favorably to

the Commonwealth, constituted reversible error." Fore v. Commonwealth, 220 Va. 1007, 1010, 265 S.E.2d 729, 731 (1980). "Ultimate questions of reasonable suspicion and probable cause to make a warrantless search" involve issues of both law and fact and are reviewed de novo on appeal. See Ornelas v. United States, 517 U.S. 690, 691 (1996). "In performing such analysis, we are bound by the trial court's findings of historical fact unless 'plainly wrong' or without evidence to support them[,] and we give due weight to the inferences drawn from those facts by resident judges and local law enforcement officers." McGee v. Commonwealth, 25 Va. App. 193, 198, 487 S. E. 2d 259, 261 (1997) (en banc) (citing Ornelas v. United States, 517 U.S. at 699).

As a general rule of constitutional law, an officer properly may make a warrantless arrest if he has probable cause to believe the arrestee has committed a crime, see Thompson v. Commonwealth, 10 Va. app. 117, 121, 390 S. E. 2d 198, 201 (1990) (citing United States v. Watson, 423 U.S. 411, 423 (1976), and the officer may search the individual incident to that lawful arrest. See Depriest v. Commonwealth, 4 Va. App. 577, 583, 359 S. E.2d 540, 543 (1987) (citing Illinois v. Lafayette, 462 U.S. 640, 646 (1983)). However, if probable cause is lacking, the arrest is illegal, and any evidence seized pursuant to that arrest is subject to exclusion under Mapp v. Ohio, 367 U.S. 643 (1961).

We hold that Officer Womack's search of appellant's pocket did not violate the Fourth Amendment because probable cause existed to arrest appellant for drinking from an open container of alcohol in violation of Code §4.1-308, a Class 4 misdemeanor. The existence of probable cause to arrest gave Womack constitutional authority to conduct a full search of appellant's person incident to that arrest.

"'The probable cause standard does not require actual knowledge. "Only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause. "'" Quigley v. Commonwealth, 14 VA. App. 28, 34,

414 S. E. 2d 851, 855 (1992) (quoting Wescott v. Commonwealth, 216 Va. 123, 126, 216 S. E. 2d 60, 63 (1975) (citation omitted)).

> "As an articulated legal standard, probable cause deals with probabilities concerning the factual and practical considerations in everyday life as perceived by reasonable and prudent persons. It is not predicated upon a clinical analysis applied by legal technicians. In determining whether probable cause exists courts will test what the totality of the circumstances meant to police officers trained in analyzing the observed conduct for purposes of crime control."

DePriest, 4 Va. App. At 584, 359 S. E. 2d at 543 (quoting Washington v. Commonwealth, 219 VA. 857, 862, 252 S. E. 2d 326, 329 (1979)) (other citations omitted).

Here, the officers saw appellant drinking from a green bottle. Although that bottle was broken, the officers found at appellant's feet several open bottles of beer and five unopen bottles in a carton. Officer Womack smelled the odor of alcohol as he talked to appellant. This evidence was sufficient to give the officers probable cause to arrest appellant for drinking alcohol in public. The officers' failure to cite appellant for that offense and the Commonwealth's failure to provide evidence to support a conviction for that offense are not dispositive factors because probable cause deals with probabilities rather than certainties.

In addition, the officers' subjective motivations in searching appellant are not relevant in this case. "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." Whren v. United States, 517 U.S. 806, 813 (1996). "'[T]hat the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not

invalidate the action taken as long as the circumstances, viewed objectively, justify that action.'" Id. (quoting Scott v. United States, 436 U.S. 128, 138 (1978) (emphasis added); see also Ohio v. Robinette, 117 s. Ct. 417, 420-421 (1996); Limonja v. Commonwealth, 8 Va. App. 532, 537-38, 383 S. E. 2d 476, 479-80 (1989).

Despite appellant's argument to the contrary, we hold that Code §19.2-74 does not delimit the officers' constitutional authority to search. That code section provides, in relevant part, that where a "person is detained by or is in the custody of an arresting officer" for a violation punishable as a Class 4 misdemeanor or any other misdemeanor for which he cannot receive a jail sentence,

> the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice. Upon the giving of such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody. However, if any such person shall fail or refuse to discontinue the unlawful act, the officer may proceed according to the provisions of 19.2-82.

Code §19.2-74(A)(2) (emphasis added). Code §19.2-74, therefore, clearly permits an officer to "detain []" an alleged violator or take him into "custody" long enough to issue a summons.

In addition, that code section contains no language nullifying the officer's ability to search based on the existence of probable cause. We hold that the existence of probable cause to arrest pursuant to the Constitution is both necessary and sufficient. See United States v. Ricard, 563 F. 2d 45, 49 (2d Cir. 1077) (holding that probable cause to

arrest permitted officer to conduct full search without effecting full custodial arrest), cert. denied, 435 U.S. 916 (1978); State v. Doran, 563 N.W. 2d 620, 622 (Iowa 1997); State v. Greenslit, 559 A. 2d 672, 674 (Vt. 1989); State v. King, 418 N.W. 2d 11, 13 (Wis. Ct. App. 1987). The Constitution does not require a full custodial arrest to permit a complete search of the arrestee; nor does Code §19.2-74 impose such a requirement. Although a state is free to provide safeguards above and beyond those guaranteed by the United States Constitution, see Penn v. Commonwealth, 13 Va. App. 399, 407 412 S. E. 2d 189, 193-194 (1991), aff'd per curiam, 244 Va. 218, 420 S. E. 2d 713 (1992), nothing in code §19.2-74 indicates the legislature's intent to abrogate the authority to search based on probable cause. Finally, even if the legislature did so intend, violation of the statute would not require suppression of evidence obtained in contravention of its terms, absent express provision to the contrary by the legislature. See Thompson, 10 Va. App. At 122, 390 S. E.. 2d at 201 ("While violations of state procedural statues are viewed with disfavor, neither the Virginia Supreme Court nor the legislature has adopted an exclusionary rule for such violations.") (citation omitted.)

Here, Officer Womack took appellant into custody on the open container violation, for which he had probable cause to arrest. Once appellant was in custody, that probable cause permitted Womack to search appellant. Pursuant to that lawful search, Womack found cocaine and marijuana, the possession of which constituted a felony.

Accordingly, we hold that the search of appellant was proper and that the trial court properly denied appellant's motion to suppress. . . .

For these reasons, we hold that the trial court did not err in denying appellant's motion to suppress. . . .

Affirmed

Judgment Order, Commonwealth v. John David Lovelace, Case No. CR97-021-00, Circuit Court of Halifax, Virginia, dated April 24, 1997

VIRGINIA: IN THE CIRCUIT COURT OF HALIFAX COUNTY

FIPS CODE: 083

Hearing Date: 4/24/97

Judge: William L. Wellons, Judge

COMMONWEALTH OF VIRGINIA

vs.

JOHN DAVID LOVELACE, Defendant

PRESENTENCE RETURN

This case came before the Court for sentencing of the defendant. Who appeared in person with his attorney, Joseph A. Sanzone. The Commonwealth was represented by, J.E. Greenbacker, Jr.

On January 17, 1997, the defendant was found guilty of the following offense:

CASE NUMBER CR97-021-00

OFFENSE DESCRIPTION AND INDICATOR (F/M)

Possess with Intent to Distribute Cocaine (F)

OFFENSE DATE 8/23/96 VA.CODE SECTION 18.2-248

The Presentence report was considered and is ordered filed as a part of the record in this case in accordance with the provisions of Code §19.2-299,

Pursuant to the provisions of Code §19.2-298.01, the Court has considered and reviewed the applicable discretionary sentencing guidelines and the guidelines worksheets. The sentencing guidelines worksheets and the written explanation of any departure from the guidelines are ordered filed as a part of the record in this case.

Before pronouncing sentence, the Court inquired if the defendant desired to make a statement and if the defendant desire to advance any reason why judgment should not be pronounced.

The Court SENTENCES the defendant to:

Incarceration with the Virginia Deparment of Corrections for the term of five (5) years on the possess with intent to distribute charge.

The Court suspends four (4) years of the Possess with the intent to distribute, sentence, for a total suspension of four (4) years, upon the following conditions:

Good Behavior: the defendant shall be of good behavior for five (5) years from the defendant's release from confinement.

Work Release: The Court authorizes work release for the defendant if he meets the requirements of the Sheriff's Department.

The defendant, by counsel, moved the Court to set an appeal bond for the defendant and the Court finding it proper so to do sets an appeal bond for the defendant at $5,000.00.

COSTS: The Commonwealth of Virginia is to recover against the said defendant its costs by it about its prosecution in this behalf expended.

4/24/97 ENTER: *[William L. Wellons]*
DATE JUDGE

Written Notice from the Supreme Court of Virginia Refusing Petition for Rehearing, November 6, 1998, Record No. 981447

Virginia: In the Supreme Court of Virginia held at the Supreme Court building in the City of Richmond on Friday the 6th day of November, 1998.

Record No. 981447

John David Lovelace, Appellant,

against Court of Appeals No. 1075-97-2

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 5th day of October, 1998 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

David B. Beach, Clerk

Written Notice from the Supreme Court of Virginia Refusing Petition from the Court of Appeals, October 5, 1998, Record No. 981447

Virginia: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 5th day of October, 1998.

Record No. 981447

John David Lovelace, Appellant,

against Court of Appeals No. 1075-97-2

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

A Copy,

Testee:
David B. Beach, Clerk

By: Wendy L. Tuck
Deputy Clerk

Transcript of Proceedings in Commonwealth v. Lovelace, Case No. CR97-021-00, in the Circuit Court of Halifax, Virginia, before the Honorable William L. Wellons on January 17, 1997, Judge Wellon's Ruling on the Motion to Suppress, Pages 30-31:

THE COURT: . . .And the question here is not whether or not there is sufficient evidence to find the defendant guilty beyond a reasonable doubt of possession or consumption of alcoholic beverages in public. The question is whether or not there is probable cause for a summons to be issued against him for that purpose.

And the Court, here, finds that there is sufficient evidence to give rise to probable cause, and, therefore, the search incident to that pat-down, the stop and the frisk. Then the Court looks at those facts and circumstances, and the evidence showed that the officer did not find a weapon on him. He did find, he did feel the bulge in his pocket, which was, I assume ultimately contained contraband that was involved. But it was something that gave rise to his having probable cause to believe that that was an item that contained contraband, was similar to those items which, I believe, he testified he'd had contact with on individuals in similar circumstances.

So the Court finds that under those circumstances the search that was conducted there was a lawful search, and, therefore, overrules the motion to suppress. . . .

VA. CODE ANN. §19.2-74 (Michie 1995)

§19.2-74. Issuance and service of summons in place of warrant in misdemeanor case; issuance of summons by special policemen and conservators of the peace. –

A.1. Whenever any person is detained by or is in the custody of an arresting officer for any violation committed in such officer's presence which offense is a violation of any county, city or town ordinance or of any provision of this Code punishable as a Class 1 or Class 2 misdemeanor or any other misdemeanor for which he may receive a jail sentence, except as otherwise provided in Title 46.2, or §18.2-266, or an arrest on a warrant charging an offense for which a summons may be issued, and when specifically authorized by the judicial officer issuing the warrant, the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice. Upon the giving by such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody. However, if any such person shall fail or refuse to discontinue the unlawful act, the officer may proceed according to the provisions of §19.2-82.

Anything in this section to the contrary notwithstanding, if any person is believed by the arresting officer to be likely to disregard a summons issued under the provisions of this subsection, or if any person is reasonably believed by the arresting officer to be likely to cause harm to himself or to any other person, a magistrate or other issuing authority having jurisdiction shall proceed according to the provisions of §19.2-82.

2. Whenever any person is detained by or is in the custody of an arresting officer for violation of any county, city, or town ordinance or of any provision of this Code, punishable as a Class 3 or Class 4 misdemeanor or any other

misdemeanor for which he cannot receive a jail sentence, except as otherwise provided in Title 46.2, or to the offense of public drunkenness as defined in §18.2-388, the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice. Upon the giving of such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody. However, if any such person shall fail or refuse to discontinue the unlawful act, the officer may proceed according to the provisions of §19.2-82.

3. Any person so summoned shall not be held in custody after the issuance of such summons for the purpose of complying with the requirements of Chapter 23 (2119.2-387 et seq.) of this title. Reports to the Central Criminal Records Exchange concerning such persons shall be made after a disposition of guilt is entered as provided for in §19.2-390.

Any person refusing to give such written promise to appear under the provisions of this section shall be taken immediately by the arresting or other police officer before a magistrate or other issuing authority having jurisdiction, who shall proceed according to provisions of §19.2-82.

Any person who willfully violates his written promise to appear, given in accordance with this section, shall be treated in accordance with the provisions of §19.2-128, regardless of the disposition of, and in addition to, the charge upon which he was originally arrested.

Any person charged with committing any violation of §18.2-407 may be arrested and immediately brought before a magistrate who shall proceed as provided in §19.2-82.

B. Special policemen of the counties as provided in §15.1-144, special policemen or conservators of the peace appointed under Chapter 2 (§19.2-12 et seq.) of this title and

special policemen appointed by authority of a city's charter may issue summonses pursuant to this section, if such officers are in uniform, or displaying a badge of office. On application, the chief law-enforcement officer of the county or city shall supply each officer with a supply of summons forms, for which such officer shall account pursuant to regulation of such chief law-enforcement officer.

C. The summons used by a law-enforcement officer pursuant to this section shall be in form the same as the uniform summons for motor vehicle law violations as prescribed pursuant to §46.2-388.

(2)

Supreme Court, U.S.
FILED
APR 8 1999
OFFICE OF THE CLERK

No. 98-1240

In The

Supreme Court of the United States

October Term, 1998

JOHN DAVID LOVELACE,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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13PP

QUESTION PRESENTED

I. WHETHER PETITIONER PROPERLY WAS SEARCHED INCIDENT TO HIS ARREST FOR POSSESSION OF AN OPEN CONTAINER OF ALCOHOLIC BEVERAGE?

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OPINION BELOW

The opinion of the Virginia Court of Appeals is reported as *Lovelace v. Commonwealth*, 27 Va. App. 575, 500 S.E.2d 267 (1998). The order of the Supreme Court of Virginia *refusing Lovelace's appeal* is found in the petitioner's appendix at page 11.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are recited in Lovelace's petition at 2 and A13-15.

STATEMENT OF THE CASE

The petitioner was convicted in a bench trial in the Circuit Court of Halifax County, Virginia, of possession of marijuana and possession of cocaine with intent to distribute. On April 24, 1997, he was sentenced to 30 days incarceration for the marijuana conviction and to five years imprisonment with four years suspended, for the cocaine conviction. (App. 8-9).

The Virginia Court of Appeals affirmed the petitioner's convictions on June 16, 1998. *Lovelace v. Commonwealth*, 27 Va. App. 575, 500 S.E.2d 267 (1998). (App. 1-7). The Virginia Supreme Court refused his petition for appeal on October 5, 1998 (App. 11) and denied a petition for rehearing on November 6, 1998. (App. 10).

STATEMENT OF FACTS

The facts surrounding the petitioner's conviction are set forth in the opinion of the Court of Appeals of Virginia as follows:

> At about 10:00 p.m. on August 23, 1996, Halifax County Deputies Sweeny and Womack saw appellant standing near a convenience store in an area "known as an open air drug market." He was drinking from a green glass bottle. Deputy Sweeny believed the bottle contained beer, and he told appellant to drop the bottle and lie face down on the ground. "Several other officers converged on the lot at the same time." "Due to the number of people on the lot," Officer Womack thought it was in the officers' best interest "to put these subjects down on the ground so we could handle the situation if somebody wanted to act up." Womack testified that appellant was being detained because of the open container of beer.
>
> When Womack told appellant to drop the bottle and lie face down on the ground, appellant dropped and broke the bottle. Near appellant's feet, Deputy Womack observed several open bottles of beer and five unopen bottles of beer in a carton. Womack had already seen a bottle hit a car beside appellant as Womack was approaching. Womack smelled the odor of alcohol as he was talking to appellant, although he could not say whether the odor was coming from appellant or from the bottle that had been broken nearby. The bottle which hit the car came from the area where appellant was standing, but Womack did not see whether appellant threw it.

> Once appellant was on the ground, Womack asked him whether he had any drugs or guns. Appellant did not reply. Womack then patted appellant down and detected "something in his pocket . . . [that] felt like a bag." "During [Womack's] experience [he'd] found drugs before on people, and sometimes they carried it in these kinds of bags. . . . [He] didn't know if it was a plastic bag or what at that time, but [he] felt some lumps and . . . felt it to be squooshy." Womack could not tell what was in the bag; however, he retrieved the bag, which was later determined to contain 2.38 grams of crack cocaine rocks and 2.96 grams of marijuana. He placed appellant under arrest for possession of marijuana and cocaine. In appellant's possession, Womack found a black pouch containing $ 121 and a razor blade. In appellant's pocket, he found $ 171.30, made up mostly of ten- and twenty-dollar bills.

(App. 2-3)

ARGUMENT

CERTIORARI IS NOT WARRANTED BECAUSE THE DECISION BELOW IS NOT INCONSISTENT WITH *KNOWLES V. IOWA*

The petitioner contends that certiorari should be granted because of alleged inconsistencies between the State court's opinion in this case and *Knowles v. Iowa*, ___ U.S. ___, 119 S. Ct. 484 (1998), which was decided after the State courts had disposed of this case. There are, however, substantial differences between this case and *Knowles*.

In *Knowles*, the Iowa police officer issued a traffic citation to Knowles and then conducted a full search of his vehicle. *Id.* at 486. The Iowa court treated the detention as a noncustodial arrest and upheld the search as a "search incident to citation." *Id.* at 487.

This Court addressed the "historical rationales" for the "search incident to arrest": the need to protect officer safety and to preserve relevant evidence during routine traffic stops. *Id.* at 487. The Court then determined that the search incident to the traffic stop in *Knowles* was improper because there was no basis for either a pat down to disclose weapons or for a search to uncover evidence of the crime. *Id.* at 488. The Court pointed out that no additional evidence of the crime of speeding could be found. *Id.*

Here, as the petitioner concedes (Pet. 10), no citation was ever issued. Virginia, moreover, has not adopted Iowa's theory that a search can be effected incident to a non-custodial arrest; the Virginia courts instead determined that petitioner was in fact in custody at the time of the search. The opinion below pointed to Virginia Code § 19.2-74, which speaks in terms of "release . . . from custody" when a summons has been issued. (App. 6, 14).

Even if this Court were to consider the petitioner's situation equivalent to *Knowles*, both bases for a search identified in *Knowles* were present here. The search was justified both because the petitioner could reasonably be considered armed and dangerous and because a search for evidence of the offense for which the petitioner was in custody might have produced evidence of that offense.

The defendant or one of his companions had thrown at least one bottle which had broken against a car as the police approached. Because the area was an open air drug market and the numerous persons present had displayed hostility to the police by throwing the bottle, the police placed the petitioner and others on the ground. On approaching the petitioner, the officer smelled the odor of alcohol. The petitioner's detention was effected at night, in a high crime area, after the police reasonably suspected that a bottle had been thrown at them by people illegally drinking alcoholic beverages in public.

The petitioner himself admits that the officer, "without making a formal arrest or without expressing any intent to do so at the time he detained Lovelace, had authority to conduct a patdown search of weapons only." (Pet. 10). He then incorrectly states that there is nothing in the officers' testimony to show that they feared for their safety.

To the contrary, the record shows that, " 'due to the number of people on the lot,' Officer Womack thought that it was in the officers' best interest 'to put the subjects down on the ground so we could handle the situation if somebody wanted to act up.' " (App. 2). The Virginia Court of Appeals also stated that "Womack had already seen a bottle hit a car beside appellant as Womack was approaching." (*Id.*). When the petitioner was asked whether he was carrying any drugs or guns, he did not respond. (*Id.*) At that point, the officers were entitled to patdown the petitioner.

The detention clearly was appropriate because the officer had probable cause to believe that the petitioner

had committed a misdemeanor. Under *Terry v. Ohio*, 392 U.S. 1, 24 (1968) " 'when an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous the officer or to others' the officer may conduct a patdown search 'to determine whether the person is in fact carrying a weapon.' " *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993). A patdown is permitted "to allow the officer to pursue his investigation without fear of violence. . . . " *Adams v. Williams*, 407 U.S. 143, 146 (1972).

Since "[e]very arrest must be presumed to present risk of danger to the arresting officer," *Washington v. Chrisman*, 455 U.S. 1, 7 (1982), an arrest of several persons in an open air drug market after potential hostility has been shown reasonably can be considered dangerous. "[T]he policeman making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspect." *Adams*, 407 U.S. at 147.

To justify a frisk the government need establish "only that there was a substantial possibility that the suspect possessed items which could be used for an attack and that he would so use them." LaFave, *Search and Seizure*, § 9.5(h) 253 (3d ed. 1996). Even the already observed possession of bottles constituted a potential threat to the officers here because the individuals being detained may already have used a bottle as a weapon.

The federal circuit courts thus have authorized patdowns where the suspect displayed a "boisterous aggressive approach" to officers and had just exited a tavern. *United States v. Holifield*, 956 F.2d 665, 667 (7th Cir. 1992); where a suspect makes a rapid movement towards a

police officer; *United States v. Cutchin*, 956 F.2d 1216, 1218 (D.C. Cir. 1992); or where a suspect displays a threatening demeanor towards the police. *United States v. Swann*, 149 F.3d 271, 274 (4th Cir. 1998).

In *United States v. Michelletti*, 13 F.3d 838 (5th Cir.), *cert. denied*, 513 U.S. 829 (1994), the court found the patdown justified because "Michelletti, a large and imposing man, was heading straight towards [the officer] with a 'cocky,' perhaps defiant attitude and his right hand concealed precisely where a weapon could be located." *Id.* at 842. The court stressed the fact that the man was leaving a bar with an open bottle of beer in his hand and that there were a number of other people in the area. *Id.* at 842-43.

Here, additionally, the defendant and the others were in an open air drug market. The courts have recognized that suspicion of being involved in drug activity carries with it a suspicion that one may be armed because "weapons and violence are frequently associated with drug transactions." *United States v. Brown*, 913 F.2d 570, 572 (8th Cir.), *cert. denied*, 498 U.S. 1016 (1990); *see also United States v. Robinson*, 119 F.3d 663, 667 (8th Cir. 1997). "[A]n area's propensity toward criminal activity is something that an officer may consider." *United States v. Lender*, 985 F.2d 151, 154 (4th Cir. 1993).[1]

---

[1] Although it is true, as the petitioner points out, that the Commonwealth did not seek to establish reasonable suspicion that Lovelace was armed and dangerous, there was no reason for the Commonwealth to do so since the petitioner did not contest the availability of the patdown. Instead he argued that probable cause for the arrest did not exist and that, even if it did, such arrest would not support the search. (App. 3).

Also unlike *Knowles*, a search for evidence was warranted here because, upon being approached by the police, Lovelace had thrown away or broken the bottle he had been holding. Although the officer suspected that the bottle had contained beer, it would have been difficult for him to prove that fact if the bottle with its contents could not be recovered. In order to determine that the substance in the bottle had been alcohol, it was appropriate to search Lovelace to determine whether he had cash register receipts from the nearby convenience store showing a recent purchase of alcoholic beverages.

Thus, this case cannot be characterized, as was *Knowles*, as "a situation where the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all." 119 S.Ct. at 488.[2]

Finally, as petitioner points out, this issue still is pending in the Virginia courts. In the case of *Rhodes v. Commonwealth*, 28 Va.App. 296, 504 S.E.2d 290 (1998), a

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[2] Even the dissent in *Rhodes* recognized that upon a non-custodial arrest a search is permitted where the factors discussed above are present.

> [A] police officer may not search an individual incident to the issuance of a summons or a citation of an offense which does not carry an active jail sentence unless: (1) the officer has reasonable suspicion that the individual is armed and dangerous, or (2) to search for evidence or instrumentalities of a specific crime for which the officer has probable cause to issue the summons or a citation to make an arrest.

28 Va. App. at 303-04, 504 S.E.2d at 393, quoting Wayne R. LaFave, *Search and Seizure*, § 5.2(h) at 96, 99 (3d ed. 1996).

rehearing *en banc* was argued in the Virginia Court of Appeals on March 24, 1999. As the petitioner states in his petition (Pet. 5), the issue in that case is identical to that in his case. The *Rhodes* court, in deciding the case, will have the *Knowles* opinion before it.

The Virginia Supreme Court, moreover, did not have *Knowles* before it when it denied the petition for appeal in this case. If the courts were to change their position in *Rhodes* and reject the decision in *Lovelace*, there would be no point in this Court addressing the same issue. On the other hand, if the Virginia courts should reach a decision similar to that they have previously reached, they would do so on the basis of *Knowles* and so present to this Court a better record on which to determine whether Virginia had appropriately interpreted applicable federal law. It is premature, therefore, to grant certiorari before the Virginia courts have had an opportunity to consider and apply *Knowles*.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Respondent herein

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